

**FILED**

**JUN 1 1996**

**ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
HEARING CLERK**

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

In re:

CATALINA YACHTS, INC.

Respondent.

Docket No. EPCRA-09-94-0015

MOTION FOR LEAVE TO CONTINUE  
ADMINISTRATIVE HEARING NOW  
SET FOR JULY 23, 1996

COMES NOW THE COMPLAINANT, the United States Environmental Protection Agency, Region 9, by its counsel of record, David M. Jones and moves the Presiding Administrative Law Judge to put over the administrative enforcement hearing in the above-entitled matter now schedule for July 23, 1996, the new hearing date to be set for the first date after August 5, 1996, that a hearing can be scheduled.

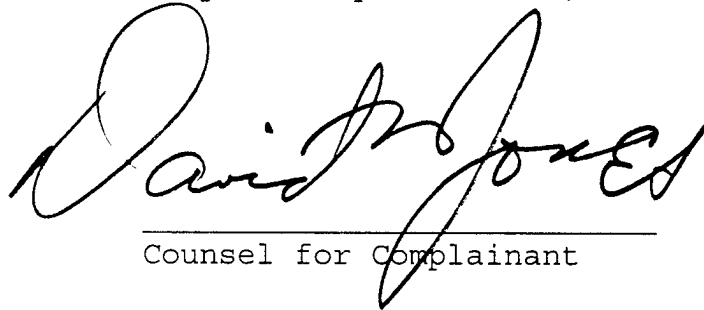
The reason for the continuance sought by this motion is that

Complainant's main witness, Dr. Pi-Yun "Pam" Tsai, will be in the Republic of China attending funeral rites for a family member. Dr. Tsai plans to return to the United States and to duty at Region 9, U. S. Environmental Protection Agency on August 5, 1996.

The continuance sought by this motion is not intended to prejudice Respondent nor favor Complainant.

Dated: June 5, 1996.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Jones". The signature is written in a cursive, flowing style. Below the signature is a horizontal line, and underneath that line, the text "Counsel for Complainant" is printed.

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Motion For Leave To Continue Administrative Hearing Set For July 23, 1996, was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

SPENCER T. NISSEN  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, Room 3706 (1900)  
Washington, D. C. 20460

and to:

Eileen M. Nottoli, Esquire  
Robert D. Wyatt, Esquire  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104-4438

6/12/96  
Date

Donna L. Carr  
Office of Regional Counsel  
U. S. Environmental Protection  
Agency, Region 9

# **Catalina** // *Yachts*

Regional Hearing Clerk  
U.S. EPA, Region IX  
Office of Regional Counsel, RC-2-1  
Post Office Box 360863  
Pittsburgh, PA 15251-6863

6273  
12

Re: In Re: Catalina Yachts, Inc.  
Docket No. EPCRA-09-94-0015

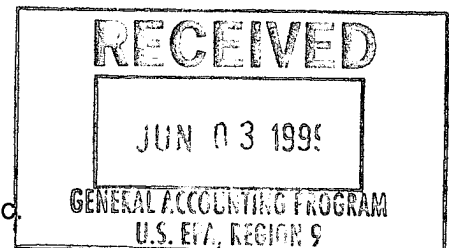
Dear Sir or Madam:

Pursuant to the Order entered by the Environmental Appeals Board dated March 24, 1999 and received by Catalina Yachts on March 30, 1999, enclosed please find certified check in the amount of \$108,792. Because Catalina filed a Motion for Reconsideration on April 8, 1999, and because the Environmental Appeals Board has not yet ruled on this motion, we respectfully request that the enclosed check not be deposited pending a ruling on the referenced motion. Catalina will write to your office within one week of receipt of EAB's disposition of the motion in order to make such adjustments as are necessary.

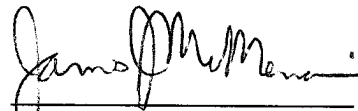
Thank you for your consideration of this request.

Very truly yours,

Catalina Yachts, Inc.



By:

  
Jim McMenamin

Enclosure

Cc: Robert D. Wyatt, Esq., Beveridge & Diamond LLP

**CATALINA • MORGAN**


P.O. Box 989 21200 Victory Blvd., Woodland Hills, CA 91367 818-884-7700 / FAX 818-884-3810

e-mail: catalina@catalinayachts.com

www.catalinayachts.com



# Mellon Bank

OFFICIAL CHECK		HOLD THE DOCUMENT AT A SMALL ANGLE TO REVEAL THIS SECURITY FEATURE	
 <b>CATALINA YACHTS</b> <b>Sanwa Bank</b> California	Check No. <b>903290339</b> MAY 21 99	16-09587/225	
Pay To the Order Of	**TREASURER OF THE UNITED STATES** * * * * * 108,792.00**		
Sanwa Bank Calif. \$108,792.00* * *			
DRAWER: SANWA BANK CALIFORNIA		Dollars	
059 PAID UNDER PROTEST		AUTHORIZED SIGNATURE	
Payable Through CCBank Int'l, Los Angeles, CA For CCBank (N.Y. State) Buffalo, NY Issued By Integrated Payment Systems Inc., Englewood, Colorado		AUTHORIZED SIGNATURE	
⑆122029587⑆68⑆055831 903290339 ⑆0010879200⑆			
THE VARIABLE TONE BACKGROUND AREA OF THIS DOCUMENT CHANGES COLOR FROM REDDISH-BROWN TO BLACK IN RESPONSE TO AN INCREASINGLY STRONG MAGNETIC FIELD			

ALLEN, PAUL, JR.

BO. IN: 0067807 EPL-SAMYRANT1500 RES  
INF DATE: 06-01-97 IN: 129510 CB: 1  
PRLC DATE: 06-05-97 RAW 18 GP# 8702  
640CH IN: 0067807

[illegible]

100429707	1	105792.00
-----------	---	-----------

RATE: 100.00      100.00  
CHRG: 00.00      1

08:210706:~1.38-55

FD/ TOTAL *	\$ 105,792.00
LRH/ CLERK *	1



# EPA

U. S. Environmental Protection Agency

REGION IX

SAN FRANCISCO, CA

Emergency Planning and Community Right-to-Know

Act of 1986 (SARA Title III)

## INSPECTION REPORT

1. INSPECTOR'S IDENTIFICATION				2. FACILITY NAME	
DATE	INSPECTORS NO.	DAILY SEQ. NO.	TIME	Catalina Yachts, Inc.	
11/15/93	EP-IX-003	4	13:45		
3) SIC CODE 3732  NUMBER OF EMPLOYEES 225  INSPECTION NOTIFICATION DATE Unannounced				4) FACILITY ADDRESS  21200 Victory Blvd.  Woodland Hills CA 91365	
5) DATE PREPARED 5/26/94				Revised 6/1/94	

This company was selected by the EPCRA Targeting System (ETS). In preparation for an inspection trip to the Los Angeles area in mid-November of 1993, the ETS was requested to list all the companies in ZIP code areas 91300 to 91399 with 50 or more employees.

This company was selected because the listed SIC code was 3732 - Boat and boat building, and it was right around the corner from another company that I planned to inspect.

On November 15, 1993, I met with Mr. Gerald B. Douglas, the Vice President. He said the facility manufactures sail boats from about 12 to 42 feet. These are all fiberglass reenforced plastic. He had not heard of this part of EPCRA but would check and get back to me.

At a later visit, on May 19, 1994, to the plant, Mr. Douglas and I went over the usages of Acetone and Styrene. Acetone was used for cleaning equipment etc. and is therefore considered "Otherwise Used". The Styrene polymerizes with the ester in the resin and form the hard plastic hull and deck, it is therefore considered "Processed".

In the letter of April 27, they listed the emissions rather than the usages. During the May 19th visit, Mr. Douglas and Mr. Wright, (who was on called on the phone), explained that the Acetone emissions were actually equal to the number of pounds used. The number of pounds of emissions for Styrene were actual emissions based on factors supplied by the resin manufacturers.

INSPECTORS SIGNATURE

DATE SIGNED

6/1/94

PAGE 1  
OF 2

**E****P****A**

U. S. Environmental Protection Agency

REGION IX

SAN FRANCISCO, CA

Emergency Planning and Community Right-to-Know

Act of 1986 (SARA Title III)

**INSPECTION REPORT**

## 1. INSPECTOR'S IDENTIFICATION

## 2. FACILITY NAME

DATE  
11/15/93INSPECTORS NO.  
EP-IX-003DAILY  
SECTION NO.  
4TIME  
13:45

Catalina Yachts, Inc.

Mr. Wright said he would supply me with the usage figures for styrene as soon as possible.

On May 24, he wrote a letter, which he FAXED to us the next day, where he listed the amount of resin used, not the amount of styrene used. In a telephone call on May 27, 1994, Mr. Wright said that Catalina Yacht used four different types of resin over the years, these contained between 20 and 62 % styrene. He thought that using the average of 41 % would be a good estimate. For the gel-coat, this usually contains between 40 and 50 % styrene, so the average would be 45 %, which he thought would be a good number to use.

Based on the information transmitted above, the following table was constructed.

Year	Acetone Usage*	Resin Usage*	Gel-coat Usage*	Styrene usage*
1987	560,727	2,774,079	625,104	1,418,668
1988	308,168	3,611,326	674,302	1,784,078
1989	101,655	3,215,000	318,219	2,691,348
1990	1,089	2,008,308	166,690	898,416
1991	323	1,296,706	206,206	624,441
1992	1,802	1,373,477	217,052	660,798

\* All usages are in pounds per calendar year.

INSPECTORS SIGNATURE

DATE SIGNED

6/1/94

PAGE  
OF2  
2



# EPA

U. S. Environmental Protection Agency

Washington D. C. 20460

Emergency Planning and Community Right-to-Know

Act of 1986 (SARA Title III)

## NOTICE OF INSPECTION

1. INSPECTOR'S IDENTIFICATION				2. FACILITY NAME	
DATE 11/16/93	INSPECTORS NO. EP1X003	DAILY SEQ. NO. 5	TIME 1345	Catalina Yachts Inc	
3. INSPECTOR'S ADDRESS U. S. Environmental Protection Agency Mail Code A-4-3 75 Hawthorne St. San Francisco CA 94105				4. FACILITY ADDRESS 21200 Victory Blvd Woodland Hills CA 91364	

### REASON FOR INSPECTION

This inspection is for the purpose of determining compliance with The Emergency Planning and Community Right-to-Know Act of 1986, Section 313 toxic chemical release reporting requirements.

The scope of this inspection may include, but is not limited to: reviewing and obtaining copies of documents and records, interviews and taking statements, review of manufacturing, importing, processing, use, and/or waste treatment facilities: taking samples and photographs, and other inspection activities necessary to determine compliance with the Act.

INSPECTOR'S SIGNATURE <i>Bill Deviny</i>		RECIPIENT SIGNATURE <i>C. B. Douglas</i>	
NAME Bill Deviny		NAME GERARD B. DOUGLAS	
TITLE TRI Program Specialist Phone 415-744-1113	Date Signed 11/17/93	TITLE V.P.	Date Signed 11.15.93



LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

ROBERT D. WYATT

July 5, 1994

VIA HAND DELIVERY

David M. Jones, Esq.  
Office of Regional Counsel  
Environmental Protection Agency  
Region 9  
75 Hawthorne Street  
San Francisco, California 94105

Re: Catalina Yachts, Inc., Woodland Hills, CA  
Complaint and Notice of Opportunity for Hearing  
Docket No. EPCRA-09-94-0015

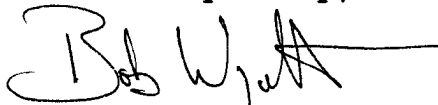
Dear David:

This letter will confirm our discussion of this afternoon wherein you granted my request for an extension of time to answer the above-referenced administrative complaint until July 14, 1994. As I mentioned, we have just been recently retained to represent Catalina Yachts, Inc. in this matter and it will take a few days to become familiar with the file.

I will try to contact you by mid-week to discuss setting up a mutually convenient time for an informal settlement conference.

Thank you for your courtesy in this matter.

Yours very truly,

  
Robert D. Wyatt

RDW:ha  
g:\user\rdw\wp\catalina

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, P.C.  
SUITE 700  
1350 I STREET, N.W.  
WASHINGTON, D.C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N.Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N.J. 07024-7502  
(201) 585-8162

ROBERT D. WYATT

September 8, 1994

**VIA HAND DELIVERY**

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear David:

In response to EPA Region 9's settlement offer at our meeting on August 25, 1994 Catalina Yachts provides the following for your consideration.

The administrative complaint alleges that Catalina Yachts, Inc. ("Catalina") failed to file seven Form R reports in violation of SARA § 313 for the use of acetone and styrene in calendar years 1988-1992. Based on the EPA Enforcement Response Policy ("Penalty Policy") for SARA § 313 violations, EPA initially proposed the maximum fine of \$25,000 for each alleged violation for a total proposed penalty of \$175,000.

At the settlement meeting, EPA offered to reduce the proposed penalty by 30% to \$122,500. EPA officials recognized that Catalina fully cooperated with EPA and that Catalina took timely action to prepare and file the relevant reports. Under the EPA Penalty Policy, cooperation and good faith efforts to timely comply with SARA § 313 can each provide a 15% reduction, and this formed the basis for Region 9's position.

David M. Jones, Esq.  
September 8, 1994  
Page - 2 -

Catalina appreciates Region 9's weighing of the facts, even though Agency personnel are constrained by the narrow limits of the penalty policy. Catalina, however, respectfully concludes that the facts of this case support a dramatically lower penalty. As Gerry Douglas of Catalina explained at the meeting, Catalina Yachts is a small family-owned corporation that designs and builds moderately priced sailboats. It did not become aware of the existence of the SARA § 313 program until the EPA site visit in November 1993. Moreover, Catalina had performed public disclosure through its filings with local government agencies and conducted community outreach in several different ways at all times relevant to this action. Consequently, Catalina had complied with the substantive requirement of SARA § 313 in ways much more likely to meet its underlying purpose and objectives of the statute and regulations.

Mr. Douglas explained that prior to 1988, Catalina prepared its own environmental reports. However, because of the significantly increased complexity in meeting numerous federal, state, and local environmental requirements, in that year Catalina hired an environmental consultant to prepare all environmental reports. The consultants did not advise Catalina of Form R requirements. Moreover, as shown to you at the settlement conference, the material safety data sheets ("MSDSs") provided by the supplier for acetone did not have any SARA § 313 notice, and the MSDSs for the resins that contained styrene had a confusing and obscure reference to SARA § 313 that did not fairly put a reasonable person on notice of the requirements. Catalina also attended a workshop on air emissions at the local air district but was not informed about these requirements.

In addition, Catalina filed documents with local agencies that disclosed the use of acetone and resins that contained styrene. Public documents filed by Catalina also disclosed its air emissions. Finally, Catalina held an open house which was attended by any community members. Visitors toured the plant and were told about the use of various materials used to construct the boats.

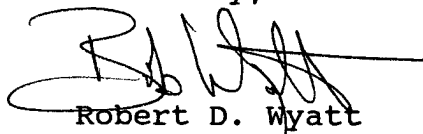
Catalina recognizes that EPA staff discretion is circumscribed by the EPA Penalty Policy. Because this Policy results in a disproportionately harsh result relative to the facts of this action, we would like to know your views regarding proceeding on a hearing before the ALJ on the enclosed draft

David M. Jones, Esq.  
September 8, 1994  
Page - 3 -

Joint Statement of Undisputed Facts. Mr. Douglas has personal knowledge of these facts and would be able sign a sworn declaration if this approach is acceptable to Region 9. Perhaps the discretion of the administrative law judge could result in a more just resolution of the proposed penalty.

If you believe there is merit to this approach, please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Wyatt", with a large, stylized flourish extending from the end of the signature.

Robert D. Wyatt

RDW:ha

cc: Gerry Douglas, Catalina Yachts, Inc.

1400.3433.03

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

January 27, 1995

**VIA FACSIMILE/MAIL**

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Offer of Settlement  
EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear Mr. Jones:

This letter is in response to the status report dated January 18, 1995 you filed with Judge Nissen (copy attached). On behalf of Catalina Yachts, Inc. ("Catalina"), we offer \$10,000 to settle the administrative complaint for the alleged failure to file SARA § 313 Form R reports. In our client's view, this offer is more than fair and reasonable for the following reasons:

- Assuming that Catalina is liable, an appropriate discounted penalty should be for one (1) count in light of all the facts and circumstances.
- Catalina Yachts is a small family-owned corporation that designs and builds moderately priced sailboats in Woodland Hills, California. Catalina was not made aware of the existence of the SARA § 313 program until the EPA site visit in November 1993.
- Prior to 1988, Catalina prepared its own government required environmental reports. However, because of the significantly increased complexity in meeting

David M. Jones, Esq.  
January 27, 1995  
Page - 2 -

numerous federal, state, and local environmental requirements in that year, Catalina hired an environmental consultant to prepare all of the company's environmental reports. The consultants did not advise Catalina of Form R requirements.

- Material safety data sheets ("MSDSs") provided to Catalina by the supplier for acetone did not have any SARA § 313 notice for product users.
- The MSDSs for the resins that contained styrene had a confusing and obscure reference to SARA § 313 that did not fairly put a reasonable person on notice of reporting requirements.
- Catalina attended several workshops on air emissions at the South Coast Air Quality Management District and was not informed about the SARA § 313 reporting requirements.
- Catalina fully cooperated with EPA during EPA's site visit in November 1993.
- Catalina took timely action to prepare and file the relevant Form R reports upon being advised by EPA of the program.
- There has been no harm to public health or the environment as a result of late filings.
- Catalina has not experienced any unauthorized releases of acetone or styrene.
- Catalina timely filed documents with local agencies that disclosed the use of acetone and resins that contained styrene. Public documents filed by Catalina also disclosed its air emissions containing acetone and styrene. In addition, Catalina has held an open house which was attended by many community members and neighbors. Visitors toured the plant and were told about the use of various materials used to build the boats.

David M. Jones, Esq.  
January 27, 1995  
Page - 3 -

- EPA proposed delisting acetone as a toxic chemical under SARA § 313 on September 30, 1994. EPA determined that acetone did not meet the listing criteria for a toxic chemical because it is not reasonable to anticipate that releases of acetone beyond a plant boundary would cause a significant adverse acute effect on humans or the environment.
- Catalina voluntarily discontinued the use of acetone beginning in 1990.
- Catalina voluntarily initiated a program to find a substitute for acetone which had historically been used to clean boat parts. Significantly, Catalina was the first boat builder in the country to successfully find a substitute for acetone, and that success has resulted in Catalina's dramatic decrease in the use of acetone from over 10,000 gallons a year to less than 100 gallons. Since that time, other boat builders around the country have followed Catalina's initiative by adopting similar programs.
- Catalina suffered substantial financial losses between 1989 to 1993.

Gerald Douglas' sworn declaration submitted on behalf of Catalina provides supporting documentation for all of these factors.

The January 10, 1995 decision of Judge Nissen recites these factors on page 2 of the Order. More significantly, Judge Nissen expressly ruled that "the Enforcement Response Policy ("ERP") is not a rule, but mere guidance, and that Region 9's assertion that it is legally bound by the ERP in settlement discussions is "patently illegal" and "makes a mockery of good faith negotiation." Order, p. 5.

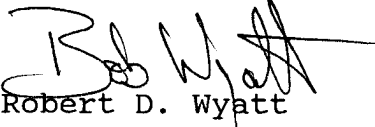
During the relevant time frame, Catalina complied with the substantive requirements of SARA § 313 in ways much more likely to meet the statute's underlying purpose, that is, community awareness, than had it merely filed Form R's which have no demonstrable channel for public dissemination. We urge EPA to consider this good faith settlement offer and to avoid any

David M. Jones, Esq.  
January 27, 1995  
Page - 4 -

further expenditures of limited agency resources or those of our client. If, as your status report suggests, you are without authority to deviate from the ERP, please provide me with the name of the appropriate official in the agency who has the discretion to weigh this matter on the merits.

Please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714 if you wish to accept this settlement. We would appreciate a response by close of business, February 3, 1995.

Sincerely,

  
Robert D. Wyatt

RDW:ha  
cc: Gerry Douglas, Catalina Yachts, Inc.  
1400.3433.04



LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

March 14, 1995

VIA FACSIMILE/MAIL

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

In re: Catalina Yachts, Inc.  
EPCRA No. 09-94-0015

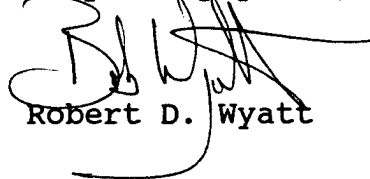
Dear Mr. Jones:

In previous correspondence you indicated that you would be furnishing proof of EPA's EPCRA information outreach program for facilities subject to SARA § 313 within Region IX, and specifically Catalina Yachts. You indicated that such information would be provided in Region IX's exchange ordered by Judge Nissen.

We are now in receipt of Region IX's information exchange documents dated March 10, 1995 and note that no such information has been provided. Accordingly, we conclude that no such information exists. If we are in error and Region IX has simply failed to furnish such information, please forward substantiating documentation at your earliest convenience.

Thank you for your cooperation in this matter.

Very truly yours,



Robert D. Wyatt

RDW:ha  
cc: Spencer T. Nissen  
Administrative Law Judge  
1400.3433.06

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION  
SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438  
(415) 397-0100

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

March 22, 1995

**VIA FACSIMILE/MAIL**

David M. Jones, Esq.  
Assistant Regional Counsel  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Catalina Yachts, Inc.  
Docket No. EPCRA 09-94-0015

Dear Mr. Jones:

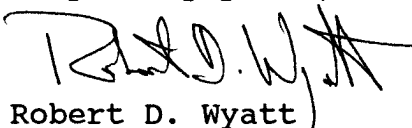
We acknowledge receipt on March 22, 1995 of your letter dated March 18, 1995 regarding your previous representations that "outreach information" regarding the SARA § 313 program was sent to our client, Catalina Yachts, Inc., and that verification of that representation is in EPA's possession. The first paragraph of your letter appears to reconfirm your prior assertion.

The purpose of our March 14th letter was to obtain such information if it exists. Your reply appears to suggest that such information exists but that you are deliberating whether to provide it to my client. We respectfully repeat our request to provide the information forthwith by means of informal discovery, rather than having to file a discovery motion to obtain the same.

We would appreciate your accommodating this request by close of business Friday, March 24, 1995.

Thank you in advance for your cooperation in this matter.

Very truly yours,

  
Robert D. Wyatt

RDW:ha  
cc: Spencer T. Nissen  
1400.3433.07

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION  
SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438  
(415) 397-0100

EILEEN M. NOTTOLI

TELECOPIER (415) 397-4238

March 13, 1995

BEVERIDGE & DIAMOND, P.C.  
SUITE 700  
1350 I STREET, N.W.  
WASHINGTON, D.C. 20005-3311  
(202) 799-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N.Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N.J. 07024-7502  
(201) 585-8163

**VIA FACSIMILE**

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Re: EPA v. Catalina Yachts, Inc.  
EPCRA No. 09-94-0015

Dear Mr. Jones:

Please advise a convenient time for the evidence exchange pursuant to Judge Nissan's Order. We are prepared to conduct the exchange at your convenience as indicated in our phone message.

Sincerely,

*Eileen Nottoli*

Eileen M. Nottoli

EMN:ha  
1400.3433.x

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

EILEEN M. NOTTOLI

July 6, 1995

BEVERIDGE & DIAMOND, P.C.  
SUITE 700  
1350 I STREET, N.W.  
WASHINGTON, D.C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N.Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N.J. 07024-7502  
(201) 585-8162

**VIA FEDERAL EXPRESS**

Honorable Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, S.W., Room 3706 (A-110)  
Washington, D.C. 20460

Re: Request for a Pre-hearing Conference  
EPA v. Catalina Yachts, Inc.

Dear Judge Nissen:

Respondent respectfully requests that the Court schedule a pre-hearing conference in San Francisco for the week of July 31-August 4, 1995, or as the Court's calendar permits. As indicated in the recent status report prepared by David M. Jones, Esq., attorney for EPA Region IX, the parties have not reached a settlement.

Sincerely,

*Eileen Nottoli*

Eileen M. Nottoli

EMN:ha

Enclosure

cc: Steven Armsey, Regional Hearing Clerk  
David M. Jones, Esq., EPA Region IX

1400.3433.phc

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

June 13, 1995

VIA FACSIMILE/MAIL

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Offer of Settlement  
EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear Mr. Jones:

This letter presents additional justification to that presented in our January 27, 1995 letter to settle the administrative complaint on behalf of Catalina Yachts, Inc. ("Catalina") for \$10,000 for the alleged failure to file Form R reports for the use of acetone in the years 1988-89 and for the use of styrene in calendar years 1988-1992 pursuant to SARA<sup>1/</sup> § 313.

The January 27 letter presented reasons why Catalina's offer was more than fair and reasonable. To recapitulate, Catalina had not been made aware of the SARA § 313 requirements; had complied with local and state requirements regarding the use and emissions of such materials; had conducted community outreach; had initiated the use of an acetone substitute at increased costs; had fully cooperated with EPA during its investigation; and timely complied with EPA post inspection filing requirements. In addition, Catalina suffered substantial financial losses during the relevant time period. Each of these mitigating factors has

---

<sup>1/</sup>SARA refers to Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 et seq., and is also known as the Emergency Planning and Community Right to Know Act of 1986.

David M. Jones, Esq.  
June 13, 1995  
Page - 2 -

been substantiated in sworn declarations by Gerry Douglas, Richard Pepiak, and Richard Sirott which were provided to EPA on March 10, 1995. Importantly, there is no evidence of environmental harm arising from Catalina's use of these materials.

We now present the following additional justifications for the proposed settlement:

- On April 21, 1995, President Clinton issued the memorandum entitled Regulatory Reform - Waiver of Penalties and Reduction of Reports. (enclosed as Exhibit 1). That memorandum directs EPA to use its discretion to the extent permitted by law to waive the imposition of all or a portion of a penalty for a small business when the violation is corrected within an appropriate time period. Clinton Memorandum ¶ 1. Because Catalina has fewer than 500 employees, it is a small business under the Small Business Association regulations. 13 C.F.R. § 121.601. SARA § 325 authorizes a maximum penalty but does not mandate a minimum. 42 U.S.C. § 11045. Consequently, Catalina qualifies to have the total proposed penalty waived.
- A review of enforcement data for alleged SARA violations indicates that cases in which EPA proposed a penalty of over \$100,000 the agency typically settled for approximately 25% of the proposed penalty. EPA Region 9's rigid insistence on compliance with the EPA Penalty Policy for settlement purposes is unfair and especially inappropriate on the facts of this case.
- The Environmental Appeals Board recently upheld a decision wherein the Presiding Officer adjusted an aggregated penalty instead of individual violations. In re: Sav-Mart, FIFRA-09-0819-C-92-36. The EAB reasoned that an adjustment based on the need to achieve deterrence without being unduly punitive is consistent with the Consolidated Rules. This decision is consistent with our position that EPA should consider the failure to submit Form R reports as a single violation.

During the relevant time frame, Catalina complied with the substantive requirement of SARA § 313 in ways much more likely to meet the statute's underlying purpose. We urge EPA to consider this good faith settlement offer and to conserve any further expenditures of limited agency resources or those of our client.

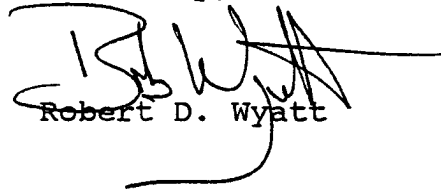
BEVERIDGE & DIAMOND

David M. Jones, Esq.  
June 13, 1995  
Page - 3 -

Please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714 if you wish to accept this settlement.

We would appreciate a response by close of business, June 16, 1995. Unless this matter is resolved, we will proceed to request Judge Nissen to either hold a pre-hearing conference to address settlement or request a hearing to resolve this matter without a penalty.

Sincerely,

A handwritten signature in black ink, appearing to read "RDW", with a long horizontal flourish extending to the right.

Robert D. Wyatt

RDW:ha  
cc: Gerry Douglas, Catalina Yachts, Inc.  
1400.3433.settle

THE WHITE HOUSE  
Office of the Press Secretary

For Immediate Release

April 24, 1995

April 21, 1995

## MEMORANDUM FOR THE SECRETARY OF STATE

THE SECRETARY OF THE TREASURY  
THE SECRETARY OF DEFENSE  
THE ATTORNEY GENERAL  
THE SECRETARY OF THE INTERIOR  
THE SECRETARY OF AGRICULTURE  
THE SECRETARY OF COMMERCE  
THE SECRETARY OF LABOR  
THE SECRETARY OF HEALTH AND HUMAN  
SERVICES  
THE SECRETARY OF HOUSING AND  
URBAN DEVELOPMENT  
THE SECRETARY OF TRANSPORTATION  
THE SECRETARY OF ENERGY  
THE SECRETARY OF EDUCATION  
THE SECRETARY OF VETERANS AFFAIRS  
THE ADMINISTRATOR, ENVIRONMENTAL  
PROTECTION AGENCY  
THE ADMINISTRATOR, SMALL BUSINESS  
ADMINISTRATION  
THE SECRETARY OF THE ARMY  
THE SECRETARY OF THE NAVY  
THE SECRETARY OF THE AIR FORCE  
THE DIRECTOR, FEDERAL EMERGENCY  
MANAGEMENT AGENCY  
THE ADMINISTRATOR, NATIONAL  
AERONAUTICS AND SPACE  
ADMINISTRATION  
THE DIRECTOR, NATIONAL SCIENCE  
FOUNDATION  
THE ACTING ARCHIVIST OF THE  
UNITED STATES  
THE ADMINISTRATOR OF GENERAL  
SERVICES  
THE CHAIR, RAILROAD RETIREMENT  
BOARD  
THE CHAIRPERSON, ARCHITECTURAL  
AND TRANSPORTATION BARRIERS  
COMPLIANCE BOARD  
THE EXECUTIVE DIRECTOR, PENSION  
BENEFIT GUARANTY CORPORATION

SUBJECT: Regulatory Reform - Waiver of Penalties and  
Reduction of Reports

On March 16, I announced that the Administration would implement new policies to give compliance officials more flexibility in dealing with small business and to cut back on paperwork. These Governmentwide policies, as well as the specific agency actions I announced, are part of this Administration's continuing commitment to sensible regulatory reform. With your help and cooperation, we hope to move the Government toward a more flexible, effective, and user friendly approach to regulation.

A. Actions: This memorandum directs the designated department and agency heads to implement the policies set forth below.

more

(OVER)



2

1. Authority to Waive Penalties. (a) To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amounts waived are used to bring the entity into compliance. The provisions in paragraph 1(a) of this memorandum shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment.

(b) Each agency shall, by June 15, 1995, submit a plan to the Director of the Office of Management and Budget ("Director") describing the actions it will take to implement the policies in paragraph 1(a) of this memorandum. The plan shall provide that the agency will implement the policies described in paragraph 1(a) of this memorandum on or before July 14, 1995. Plans should include information on how notification will be given to frontline workers and small businesses.

2. Cutting Frequency of Reports. (a) Each agency shall reduce by one-half the frequency of the regularly scheduled reports that the public is required, by rule or by policy, to provide to the Government (from quarterly to semiannually, from semiannually to annually, etc.), unless the department or agency head determines that such action is not legally permissible; would not adequately protect health, safety, or the environment; would be inconsistent with achieving regulatory flexibility or reducing regulatory burdens; or would impede the effective administration of the agency's program. The duty to make such determinations shall be nondisputable.

(b) Each agency shall, by June 15, 1995, submit a plan to the Director describing the actions it will take to implement the policies in paragraph 2(a), including a copy of any determination that certain reports are excluded.

8. Application and Scope: 1. The Director may issue further guidance as necessary to carry out the purposes of this memorandum.

2. This memorandum does not apply to matters related to law enforcement, national security, or foreign affairs, the importation or exportation of prohibited or restricted items, Government taxes, duties, fees, revenues, or receipts; nor does it apply to agencies (or components thereof) whose principal purpose is the collection, analysis, and dissemination of statistical information.

3. This memorandum is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees.

4. The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON

# # #

RECEIVED JAN 24 1995

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

In re:

CATALINA YACHTS, INC.,

Respondent.

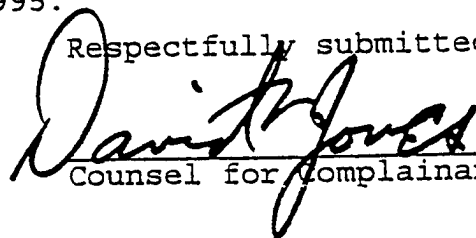
Docket No. EPCRA-09-94-0015

STATUS REPORT

Representatives of the parties talked by telephone last Thursday when counsel for Complainant returned counsel for Respondent's call. Counsel for Respondent believes that the civil penalty to be assessed should be nominal in amount since there was no harm to the environment or to man. Counsel for Complainant believes that to obtain the approval of Regional officials the settlement must be within the limits of the Enforcement Response Policy. Complainant is open to further settlement discussions within the parameters of the Enforcement Response Policy.

Dated: January 18, 1995.

Respectfully submitted,

  
Counsel for Complainant

CERTIFICATE OF SERVICE

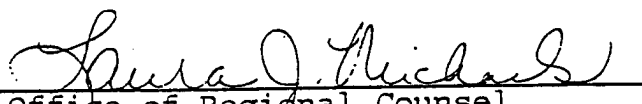
I hereby certify that the original copy of the foregoing Status Report was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, Room 3706 (1900)  
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire  
Eileen M. Nottoli, Esquire  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, California 94105

1-18-95  
Date

  
Office of Regional Counsel  
U. S. Environmental Protection  
Agency, Region 9

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

January 27, 1995

VIA FACSIMILE/MAIL

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Offer of Settlement  
EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear Mr. Jones:

This letter is in response to the status report dated January 18, 1995 you filed with Judge Nissen (copy attached). On behalf of Catalina Yachts, Inc. ("Catalina"), we offer \$10,000 to settle the administrative complaint for the alleged failure to file SARA § 313 Form R reports. In our client's view, this offer is more than fair and reasonable for the following reasons:

- Assuming that Catalina is liable, an appropriate discounted penalty should be for one (1) count in light of all the facts and circumstances.
- Catalina Yachts is a small family-owned corporation that designs and builds moderately priced sailboats in Woodland Hills, California. Catalina was not made aware of the existence of the SARA § 313 program until the EPA site visit in November 1993.
- Prior to 1988, Catalina prepared its own government required environmental reports. However, because of the significantly increased complexity in meeting

David M. Jones, Esq.  
January 27, 1995  
Page - 2 -

numerous federal, state, and local environmental requirements in that year, Catalina hired an environmental consultant to prepare all of the company's environmental reports. The consultants did not advise Catalina of Form R requirements.

- Material safety data sheets ("MSDSs") provided to Catalina by the supplier for acetone did not have any SARA § 313 notice for product users.
- The MSDSs for the resins that contained styrene had a confusing and obscure reference to SARA § 313 that did not fairly put a reasonable person on notice of reporting requirements.
- Catalina attended several workshops on air emissions at the South Coast Air Quality Management District and was not informed about the SARA § 313 reporting requirements.
- Catalina fully cooperated with EPA during EPA's site visit in November 1993.
- Catalina took timely action to prepare and file the relevant Form R reports upon being advised by EPA of the program.
- There has been no harm to public health or the environment as a result of late filings.
- Catalina has not experienced any unauthorized releases of acetone or styrene.
- Catalina timely filed documents with local agencies that disclosed the use of acetone and resins that contained styrene. Public documents filed by Catalina also disclosed its air emissions containing acetone and styrene. In addition, Catalina has held an open house which was attended by many community members and neighbors. Visitors toured the plant and were told about the use of various materials used to build the boats.

David M. Jones, Esq.  
January 27, 1995  
Page - 3 -

- EPA proposed delisting acetone as a toxic chemical under SARA § 313 on September 30, 1994. EPA determined that acetone did not meet the listing criteria for a toxic chemical because it is not reasonable to anticipate that releases of acetone beyond a plant boundary would cause a significant adverse acute effect on humans or the environment.
- Catalina voluntarily discontinued the use of acetone beginning in 1990.
- Catalina voluntarily initiated a program to find a substitute for acetone which had historically been used to clean boat parts. Significantly, Catalina was the first boat builder in the country to successfully find a substitute for acetone, and that success has resulted in Catalina's dramatic decrease in the use of acetone from over 10,000 gallons a year to less than 100 gallons. Since that time, other boat builders around the country have followed Catalina's initiative by adopting similar programs.
- Catalina suffered substantial financial losses between 1989 to 1993.

Gerald Douglas' sworn declaration submitted on behalf of Catalina provides supporting documentation for all of these factors.

The January 10, 1995 decision of Judge Nissen recites these factors on page 2 of the Order. More significantly, Judge Nissen expressly ruled that "the Enforcement Response Policy ("ERP") is not a rule, but mere guidance, and that Region 9's assertion that it is legally bound by the ERP in settlement discussions is "patently illegal" and "makes a mockery of good faith negotiation." Order, p. 5.

During the relevant time frame, Catalina complied with the substantive requirements of SARA § 313 in ways much more likely to meet the statute's underlying purpose, that is, community awareness, than had it merely filed Form R's which have no demonstrable channel for public dissemination. We urge EPA to consider this good faith settlement offer and to avoid any

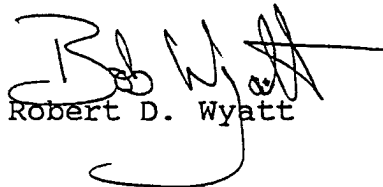
BEVERIDGE & DIAMOND

David M. Jones, Esq.  
January 27, 1995  
Page - 4 -

further expenditures of limited agency resources or those of our client. If, as your status report suggests, you are without authority to deviate from the ERP, please provide me with the name of the appropriate official in the agency who has the discretion to weigh this matter on the merits.

Please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714 if you wish to accept this settlement. We would appreciate a response by close of business, February 3, 1995.

Sincerely,

  
Robert D. Wyatt

RDW:ha

cc: Gerry Douglas, Catalina Yachts, Inc.

1400.3433.04

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

August 2, 1995

**VIA HAND DELIVERY**

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Offer of Settlement  
EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear Mr. Jones:

The purpose of this letter is once again to propose, on behalf of Catalina Yachts, Inc. ("Catalina"), that EPA settle the administrative complaint for \$10,000 for the alleged failure to file Form R reports for the use of acetone in the years 1988-89 and for the use of styrene in calendar years 1988-1992 pursuant to SARA<sup>1/</sup> § 313. Copies of our prior January 27 and June 13, 1995 settlement proposals are enclosed for your convenience.

The January 27 letter presented reasons why Catalina's offer was more than fair and reasonable. To recapitulate, Catalina had not been made aware of the SARA § 313 requirements; had complied with local and state requirements regarding the use and emissions of such materials; had conducted community outreach; had initiated the use of an acetone substitute at increased costs;

---

<sup>1/</sup>SARA refers to Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 et seq., and is also known and the Emergency Planning and Community Right to Know Act of 1986.



David M. Jones, Esq.  
August 2, 1995  
Page - 2 -

had fully cooperated with EPA during its investigation; and timely complied with EPA post inspection filing requirements. In addition, Catalina suffered substantial financial losses during the relevant time period. Each of these mitigating factors has been substantiated in sworn declarations by Gerry Douglas, Richard Pepiak, and Richard Sirott which were provided to EPA on March 10, 1995. Importantly, there is no evidence of environmental harm arising from Catalina's use of these materials.

The June 13 letter presented the following additional reasons to support our settlement offer:

- A review of enforcement data for alleged SARA violations indicates that cases in which EPA proposed a penalty of over \$100,000 the agency typically settled for approximately 25% of the proposed penalty. EPA Region 9's rigid insistence on compliance with the EPA Penalty Policy for settlement purposes is unfair and especially inappropriate on the facts of this case.
- The Environmental Appeals Board recently upheld a decision wherein the Presiding Officer adjusted an aggregated penalty instead of individual violations. In re: Sav-Mart, FIFRA-09-0819-C-92-36. The EAB reasoned that an adjustment based on the need to achieve deterrence without being unduly punitive is consistent with the Consolidated Rules. This decision is consistent with our position that EPA should consider Catalina's failure to submit Form R reports as a single violation.

With this letter, we also enclose a copy of the June 16, 1995 Federal Register notice delisting acetone as a SARA § 313 toxic chemical.

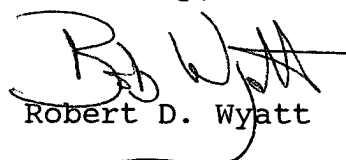
During the relevant time frame, Catalina complied with the substantive requirement of SARA § 313 in ways much more likely to meet the statute's underlying purpose. We urge EPA to consider this good faith settlement offer and to conserve any further expenditures of limited agency resources or those of our client.

BEVERIDGE & DIAMOND

David M. Jones, Esq.  
August 2, 1995  
Page - 3 -

Please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714 if you wish to accept this settlement. We would appreciate a response by close of business, August 4, 1995.

Sincerely,



Robert D. Wyatt

RDW:ha  
Enclosure  
cc: Gerry Douglas, Catalina Yachts, Inc.  
1400.3433.settle.3

1 Robert D. Wyatt, Esq.  
2 Eileen M. Nottoli, Esq.  
3 BEVERIDGE & DIAMOND  
4 One Sansome Street  
5 Suite No. 3400  
6 San Francisco, California 94104

7 Attorneys for Respondent  
8 Catalina Yachts, Inc.

MAR 15 1996

ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
HEARING CLERK

9 UNITED STATES  
10 ENVIRONMENTAL PROTECTION AGENCY  
11 REGION IX  
12 75 HAWTHORNE STREET  
13 SAN FRANCISCO, CA 94105

14 In the matter of: ) Docket No. EPCRA 09-94-0015  
15 )  
16 CATALINA YACHTS, INC. ) MEMORANDUM OF POINTS AND  
17 ) AUTHORITIES IN OPPOSITION  
18 ) TO COMPLAINANT'S MOTION FOR  
19 ) PRODUCTION OF TAX RETURNS  
20 )

21 Respondent Catalina Yachts, Inc. opposes Complainant  
22 United States Environmental Protection Agency, Region 9's,  
23 ("EPA Region 9") motion for production of Respondent's five  
24 most recent Federal Income Tax Returns upon the following  
25 points and authorities.

26 PRELIMINARY STATEMENT

27 This case is now set for hearing on May 14, 1996 on the  
28 issue of the appropriateness of EPA Region 9's proposed penalty  
of \$175,000 for seven alleged violations of EPCRA subsection  
325(c) reporting requirements. Complainant has already been  
provided with a sworn declaration from Respondent's accountant  
as to Catalina's financial status for the relevant years in the

1 pre-hearing exchange conducted in March of 1995, and moreover,  
2 Complainant itself has produced a Dun & Bradstreet report on  
3 Catalina's financial status. Hence, Complainant's motion is  
4 burdensome, duplicative and without merit. It should be  
5 denied.

6 ARGUMENT

7 As the sole grounds for its motion, EPA Region 9 cites In  
8 Re: New Waterbury, Ltd. (1994), TSCA Appeal No. 93-2, decided  
9 October 20, 1994. That case is not on point for at least three  
10 reasons. First, the case does not speak to alleged violations  
11 of EPCRA. Second, even if one were to analogize the holding  
12 and reasoning of the Environmental Appeals Board regarding  
13 Complainant's burden of proof under TSCA to cases arising under  
14 EPCRA, such analogies would be limited to alleged violations of  
15 EPCRA subsection 325(b) cases (42 USC 11045(b)) but not EPCRA  
16 subsection 325(c) cases, such as the instant case. That is  
17 because both TSCA and EPCRA subsection 325(b) expressly require  
18 the Administrator to take into account, *inter alia*, "ability to  
19 pay" in determining "any penalty assessed pursuant to this  
20 subsection...", whereas subsection 325(c) contains no such  
21 directive. Finally, Respondent has not asserted "ability to  
22 pay" as a defense to the proposed penalty, but rather has  
23 submitted evidence of its financial condition during the  
24 relevant time frame as one of several compelling factors which  
25 argue for no penalty or a *de minimus* penalty.

26 ///

27 ///

1 For all of the foregoing reasons, Complainant's motion  
2 should be denied.

3 Dated: March 15, 1996

4 Respectfully submitted,

5 BEVERIDGE & DIAMOND

6  
7 By: 

8 Robert D. Wyatt  
9 Attorneys for Respondent  
10 Catalina Yachts, Inc.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

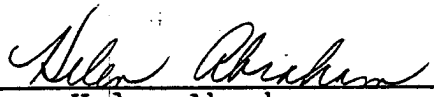
I hereby certify that the original copy of the foregoing Memorandum of Points and Authorities in Opposition to Complainant's Motion for Production of Tax Returns was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by First Class Mail to:

Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental  
Protection Agency  
401 M Street, S.W., Room 3706 (1900)  
Washington, D.C. 20460

and to:

David M. Jones, Esq.  
Assistant Regional Counsel  
United States Environmental Protection  
Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Date: March 15, 1996

  
Helen Abraham

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION  
SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438  
(415) 397-0100

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

TELECOPIER (415) 397-4238

March 29, 1996

BEVERIDGE & DIAMOND, P. C.  
SUITE 700  
1350 I STREET, N. W.  
WASHINGTON, D. C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N. Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N. J. 07024-7502  
(201) 585-8162

**VIA FEDERAL EXPRESS**

Honorable Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, S.W., Room 3706 (1900)  
Washington, D.C. 20460

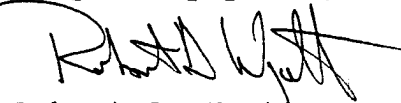
Re: EPA v. Catalina Yachts, Inc.  
Docket No. EPCRA 09-94-0015

Dear Judge Nissen:

I write seeking clarification of the Court's Order dated March 15, 1996, which was postmarked March 18, 1996 and received by us on March 21, 1996. As the file will show, respondent filed its opposition to complainant's motion for production of the five most recent Federal income tax returns in a timely manner on March 15, 1996. Therefore, the specific inquiry I make here is whether the Court had an opportunity to read and consider respondent's opposition prior to the March 15, 1996 ruling. (File stamped copy enclosed for ease of reference).

In the event the Court did not have an opportunity to consider respondent's opposition on the merits, we would respectfully request that the Court accept this letter as a motion for reconsideration.

Very truly yours,



Robert D. Wyatt

RDW:ha  
Enclosure  
cc: David M. Jones, Esq., Counsel for Complainant  
Steven Armsey, Regional Hearing Clerk  
1400.3433.12

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

ROBERT D. WYATT

September 8, 1994

BEVERIDGE & DIAMOND, P.C.  
SUITE 700  
1350 I STREET, N.W.  
WASHINGTON, D.C. 20005-3311  
(202) 789-6000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N.Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N.J. 07024-7502  
(201) 585-8162

**VIA HAND DELIVERY**

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental  
Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: EPA v. Catalina Yachts, Inc.  
EPCRA Docket No. 09-94-0015

Dear David:

In response to EPA Region 9's settlement offer at our meeting on August 25, 1994 Catalina Yachts provides the following for your consideration.

The administrative complaint alleges that Catalina Yachts, Inc. ("Catalina") failed to file seven Form R reports in violation of SARA § 313 for the use of acetone and styrene in calendar years 1988-1992. Based on the EPA Enforcement Response Policy ("Penalty Policy") for SARA § 313 violations, EPA initially proposed the maximum fine of \$25,000 for each alleged violation for a total proposed penalty of \$175,000.

At the settlement meeting, EPA offered to reduce the proposed penalty by 30% to \$122,500. EPA officials recognized that Catalina fully cooperated with EPA and that Catalina took timely action to prepare and file the relevant reports. Under the EPA Penalty Policy, cooperation and good faith efforts to timely comply with SARA § 313 can each provide a 15% reduction, and this formed the basis for Region 9's position.



David M. Jones, Esq.  
September 8, 1994  
Page - 2 -

Catalina appreciates Region 9's weighing of the facts, even though Agency personnel are constrained by the narrow limits of the penalty policy. Catalina, however, respectfully concludes that the facts of this case support a dramatically lower penalty. As Gerry Douglas of Catalina explained at the meeting, Catalina Yachts is a small family-owned corporation that designs and builds moderately priced sailboats. It did not become aware of the existence of the SARA § 313 program until the EPA site visit in November 1993. Moreover, Catalina had performed public disclosure through its filings with local government agencies and conducted community outreach in several different ways at all times relevant to this action. Consequently, Catalina had complied with the substantive requirement of SARA § 313 in ways much more likely to meet its underlying purpose and objectives of the statute and regulations.

Mr. Douglas explained that prior to 1988, Catalina prepared its own environmental reports. However, because of the significantly increased complexity in meeting numerous federal, state, and local environmental requirements, in that year Catalina hired an environmental consultant to prepare all environmental reports. The consultants did not advise Catalina of Form R requirements. Moreover, as shown to you at the settlement conference, the material safety data sheets ("MSDSs") provided by the supplier for acetone did not have any SARA § 313 notice, and the MSDSs for the resins that contained styrene had a confusing and obscure reference to SARA § 313 that did not fairly put a reasonable person on notice of the requirements. Catalina also attended a workshop on air emissions at the local air district but was not informed about these requirements.

In addition, Catalina filed documents with local agencies that disclosed the use of acetone and resins that contained styrene. Public documents filed by Catalina also disclosed its air emissions. Finally, Catalina held an open house which was attended by any community members. Visitors toured the plant and were told about the use of various materials used to construct the boats.

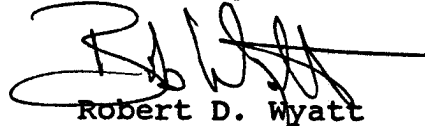
Catalina recognizes that EPA staff discretion is circumscribed by the EPA Penalty Policy. Because this Policy results in a disproportionately harsh result relative to the facts of this action, we would like to know your views regarding proceeding on a hearing before the ALJ on the enclosed draft

David M. Jones, Esq.  
September 8, 1994  
Page - 3 -

Joint Statement of Undisputed Facts. Mr. Douglas has personal knowledge of these facts and would be able sign a sworn declaration if this approach is acceptable to Region 9. Perhaps the discretion of the administrative law judge could result in a more just resolution of the proposed penalty.

If you believe there is merit to this approach, please call me at (415) 983-7701 or Eileen M. Nottoli at (415) 983-7714.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Wyatt", with a large, sweeping flourish at the end.

Robert D. Wyatt

RDW:ha

cc: Gerry Douglas, Catalina Yachts, Inc.

1400.3433.03



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

January 31, 1995

Robert D. Wyatt, Esquire  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, CA 94104-4438

Re: Catalina Yachts, Inc.  
Docket No. EPCRA-09-94-0015

Dear Mr. Wyatt:

Receipt of your letter of January 27, 1995, regarding the subject administrative enforcement action is hereby acknowledged. By this letter you are informed that your offer in settlement of this action by payment of a civil penalty of \$10,000.00 is unacceptable. In your aforementioned letter you set forth fifteen bullets which identify your belief that your inadequate offer in settlement is fair and reasonable. The following is our response to those reasons:

1. Assuming that Catalina is liable, an appropriate discounted penalty should be for one (1) count in light of all the facts and circumstances.

All of the facts and circumstances are set forth in the Complaint and Notice of Opportunity for Hearing (Complaint). We proceed in settlement on the basis that our Complaint is valid unless and until persuaded to the contrary by Respondent. To date we have seen nothing on the record in this matter which we can consider as in any way diminishing the validity of our Complaint. There is no basis either in law or fact for "an appropriate discounted penalty." There is no basis in this administrative enforcement action either in law or fact for a penalty assessment based on just one count.

2. Catalina Yachts is a small family-owned corporation that designs and builds moderately priced sailboats in Woodland Hills, California. Catalina was not made aware of the existence of the SARA § 313 program until the EPA site visit in November 1993.

The characterization of Respondent as "small" and "family-owned" in no way biases Respondent so far as Complainant is concerned. According to the information in our possession, Respondent's annual gross sales were approximately \$40,000,000.00.

Robert D. Wyatt, Esquire  
Catalina Yachts, Inc.  
January 31, 1995

Page 3

5. The MSDSs for the resins that contained styrene had a confusing and obscure reference to SARA § 313 that did not fairly put a reasonable person on notice of reporting requirements.

The nature of the MSDSs that is "confusing and obscure reference to SARA § 313" which in the opinion of Respondent "did not fairly put a reasonable person on notice" that there was an obligation under EPCRA to submit a Form R is simply a matter of Respondent's opinion. Nevertheless, upon a showing by Respondent such "confusing and obscure reference" may give rise to a further adjustment of the proposed civil penalty in settlement. Again, ignorance is no excuse and everyone is deemed to know the law.

6. Catalina attended several workshops on air emissions at the South Coast Air Quality Management District and was not informed about the SARA § 313 reporting requirements.

Respondent has made no showing that the South Coast Air Quality Management District has any responsibility to inform Respondent with respect to Respondent's obligations under EPCRA. Again, everyone is deemed to know the law.

7. Catalina fully cooperated with EPA during EPA's site visit in November 1993.

In this regard Respondent was only doing that which it was legally obligated to do, that is cooperate with the EPCRA Inspector. While such cooperation is expected, desired and welcome, not a lot of credit can be given by way of penalty reduction for good behavior. However, credit for cooperation is implicit in the offer that was made during our last settlement conference.

8. Catalina took timely action to prepare and file the relevant Form R reports upon being advised by EPA of the program.

See my remarks under 7 above.

9. There has been no harm to public health or the environment as a result of late filings.

It is a well known fact that EPCRA is a national neighborhood watch program. The violation is not based on harm in the physical sense but the deprivation of information relative to the possibility of harm. EPCRA, like all of the Environmental Statutes, is a strict liability statute. Strict liability being an offshoot of the criminal law, there is no requirement of a showing of harm in order to find liability.

Robert D. Wyatt, Esquire  
Catalina Yachts, Inc.  
January 31, 1995

Page 5

discontinuance of acetone was purely a program call. This writer would suggest that if Respondent discontinued the use of the chemical (13 above) as opposed to substitution of some other chemical not on the list of chemicals subject to EPCRA, the substitution would, from our point of view, be more impressive. The discontinuance suggests that the use of the chemical in the manufacture of Respondent's product was unnecessary all along. Whether discontinued or substituted, more information is needed. Among other things, we would like to know when the substitution effort took place, before or after the inspection.

15. **Catalina suffered substantial financial losses between 1989 to 1993.**

In support of any claim that Respondent lacks ability to pay, we would like to have a certified or signed copy of Respondent's Income Tax Return for the five years preceding the date the Complaint was filed.

The last full paragraph on page 3 of your letter contains either a misunderstanding or a grievous misstatement of the facts. At no time has this writer ever stated or represented to you that he was "bound" by the Enforcement Response Policy. What I have told you, and I repeat here, is that I will not deviate from the requirements of the Enforcement Response Policy. There is a distinct difference between what I have said and your claim as to what I have said.

As for Judge Nissen's predilections regarding the Region's views with respect to the Enforcement Response Policy, I have two responses:

1) Judge Nissen's remarks may foretell how Judge Nissen will rule if the matter of the civil penalty comes before him, but until such time, the Enforcement Response Policy is the Agency's guidance in the matter of penalty which Regional management instructs that I shall follow;

2) Judge Nissen has no part in settlement discussions and to the extent that his remarks are regarded as such are clearly outside of the bounds of his authority.

In the penultimate paragraph of your letter you ask me to refer you to someone in the Agency who can give you the relief that you desire. Please be informed that until Regional management informs this writer to the contrary, I will be the Agency's legal representative in this action. In the event there is any change in the Region's policy regarding civil penalty and the Enforcement Response Policy, you will hear it from me just as



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

September 12, 1994

Robert D. Wyatt, Esquire  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104-4438

Re: Cataline Yachts, Inc.  
Docket No. EPCRA-09-94-0015

Dear Mr. Wyatt:

Receipt of your letter of September 8, 1994, subject as above and the accompanying proposed Joint Statement of Undisputed Facts is hereby acknowledged. Your aforementioned declaration contains many statements the basis for which is known only to your client. Accordingly, we decline your invitation to join you in the stipulation.

That your client is interested in reducing the civil penalty assessed in this administrative enforcement action to a bare minimum should come as no surprise to either of us. The only sound manner in which the desired result can be achieved in my experience is through the hearing process.

As you readily admit in your proposed statement, your client failed to file the Form Rs as alleged in the complaint. So, why should either of us labor that issue. The better approach in my view is to stipulate to the fact that there are no material issues of fact with respect to liability and file a joint motion asking the Presiding Administrative Law Judge to decide the amount of the civil penalty based on submissions from each side.

I believe that the approach suggested above will severely curtail the amount of time and expense either side will suffer in disposing of this matter. Please let me have your concurrence by return mail and if you so chose, your proposed stipulation with respect to liability.

Sincerely yours,

A handwritten signature in black ink, which appears to read "David M. Jones", is written over the typed name and title.

David M. Jones  
Assistant Regional Counsel

LAW OFFICES  
**BEVERIDGE & DIAMOND**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 3400  
ONE SANSOME STREET  
SAN FRANCISCO, CA 94104-4438

(415) 397-0100

TELECOPIER (415) 397-4238

BEVERIDGE & DIAMOND, R.C.  
SUITE 700  
1350 I STREET, N.W.  
WASHINGTON, D.C. 20005-3311  
(202) 789-8000

40TH FLOOR  
437 MADISON AVENUE  
NEW YORK, N.Y. 10022-7380  
(212) 702-5400

BEVERIDGE & DIAMOND  
ONE BRIDGE PLAZA  
FORT LEE, N.J. 07024-7502  
(201) 588-8182

ROBERT D. WYATT  
DIRECT DIAL NUMBER  
(415) 983-7701

March 4, 1996

VIA FACSIMILE/MAIL

The Honorable Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, S.W., Room M3708B  
Washington, D.C. 20460

Re: EPA v. Catalina Yachts, Inc.  
Docket No. EPCRA 09-94-0015

Dear Judge Nissen:

This letter will confirm the availability of my client for hearing in the above-captioned matter on Tuesday, May 14, 1996. I understand that the Court will be issuing an order confirming the hearing date, as well as a schedule for submission of briefs and related matters.

Very truly yours,

  
Robert D. Wyatt

RDW:ha

cc: David M. Jones, Esq., EPA Region IX  
1400.3433.09



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

October 9, 1996

Robert D. Wyatt, Esquire  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, CA 94104-4438

Re: Catalina Yachts, Inc.  
Docket No. EPCRA-09-94-0015

Dear Mr. Wyatt:

You will recall that our letter of May 22, 1996, transmitted our proposed Stipulation of Facts to be entered on the record in the subject administrative enforcement action. Accompanying this letter is our latest version of the proposed Stipulation of Facts for your review.

In the enclosed Stipulation we have modified the earlier version to emphasize that the Form Rs with which the action is concerned cover the Woodland Hills facility. Fact number 32 has been added to show that the Morgan Division of the subject corporation is not involved in the subject administrative enforcement action because our files show that they have submitted their Form Rs in a timely manner.

As discussed during our recent telephone conversations, I believe that a stipulation of the facts as we propose will go a long way in disposing of this action before the hearing takes place and will benefit both sides. I urge you to review the enclosed document at your earliest opportunity and if you find the proposed stipulation acceptable, execute same in the place provided and return the executed document to me. Upon receipt I will sign the document, file the original document with the Regional Hearing Clerk and return a fully executed copy to you for your files.

Sincerely yours,

David M. Jones  
Assistant Regional Counsel

Enclosure



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

In re:

CATALINA YACHTS, INC.,

Respondent.

Docket No. EPCRA-09-94-0015

STIPULATION OF FACTS

The parties to this administrative enforcement action hereby stipulate to the following facts:

1. The Respondent is Catalina Yachts, Inc., a designer and builder of modestly priced boats.
2. Catalina Yachts, Inc. is a California corporation.
3. The Respondent is a person as defined by Section 329(7) of EPCRA.
4. The Respondent is an owner or operator of a facility as defined by Section 329(4) OF EPCRA which is located at 21200 Victory Boulevard, Woodland Hills, CA 91364 (hereinafter "Facility").
5. The Facility employs ten or more full-time employees as

defined by 40 C.F.R. § 372.3.

6. The Facility is classified in Standard Industrial Classification 3732.

7. An authorized EPA representative inspected the Facility on or about November 15, 1993.

8. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 and 1989 Respondent otherwise used acetone, CAS No. 67-64-1, in excess of 10,000 pounds.

9. Acetone is a toxic chemical, which, at the time of the inspection was listed under 40 C.F.R. § 372.65.

10. Respondent failed to submit a Form R for calendar years 1988 and 1989 for acetone to the Administrator, U.S. Environmental Protection Agency and to the State of California, by July 1 of 1989 and 1990.

11. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 Respondent processed styrene, CAS No. 100-42-5, in excess of 50,000 pounds.

12. The November 15, 1993, inspection of the Facility revealed that in calendar years 1989, 1990, 1991 and 1992, Respondent processed styrene, CAS No. 100-42-5 in excess of 25,000 pounds.

13. Styrene is a toxic chemical listed under 40 C.F.R. § 372.65.

14. Respondent failed to submit a Form R for the Facility for calendar years 1988, 1989, 1990, 1991 and 1992, for styrene to the Administrator, U.S. Environmental Protection Agency and to the State of California, by July 1 of 1989, 1990, 1991, 1992 and 1993.

15. The Order Granting Motion For Accelerated Decision As To Liability dated January 10, 1995, established that Respondent has violated EPCRA as alleged in the Complaint and that the only issue remaining for hearing is the amount of the civil penalty to be assessed.
16. Respondent had annual sales of approximately \$38 million at the time that the Complaint was filed.
17. Respondent had more than fifty employees at the time that the Complaint was filed.
18. The proposed civil penalty set forth in the Complaint was calculated in accordance with the August 10, 1992, Enforcement Response Policy for Section 313 and Section 6607 of the Pollution Prevention Act (1990) (hereinafter "ERP").
19. In calculation of the civil penalty in this matter, EPA took into account the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to pay, effect on ability to continue in business, history of prior such violations, the degree of culpability and such other matters as justice may require.
20. The purpose of the ERP is to ensure that the U.S. Environmental Protection Agency takes appropriate enforcement actions in a fair and consistent manner as well as to ensure that the enforcement response is appropriate for the violation.
21. In calendar years 1988 and 1989, Respondent used more than ten times the 10,000 pound threshold for otherwise use of acetone.

22. Respondent submitted the Form Rs for the Facility for calendar years 1988 and 1989, for acetone greater than one year after July 1, 1989 and July 1, 1990, respectively.
23. In calendar year 1988, Respondent processed more than ten times the 50,000 pound threshold for styrene.
24. In calendar year 1989, 1990, 1991 and 1992, Respondent processed more than ten times the 25,000 pound threshold for styrene at the Facility.
25. Respondent submitted the Form R for the Facility for calendar year 1989, for styrene greater than one year after July 1, 1990.
26. Respondent submitted the Form R for the Facility for calendar year 1990, for styrene greater than one year after July 1, 1991.
27. Respondent submitted the Form R for the Facility for calendar year 1991, for styrene greater than one year after July 1, 1992.
28. Respondent submitted the Form R for the Facility for calendar year 1992, for styrene greater than one year after July 1, 1993.
29. Respondent is currently in compliance with EPCRA.
30. Respondent submitted the appropriate forms for the Facility for acetone to the State of California for 1988, 1989 and for styrene for 1988, 1989, 1990, 1991 and 1992.
31. Respondent does not have a history of past violations of EPCRA either at the Facility.

32. Respondent's Morgan Division located at 7200 Bryan Dairy Road, Largo, Florida 34747-1504 is not involved in this administrative enforcement action because Complainant's records show that Form Rs were submitted for acetone and styrene as required by law.

33. Region 9 has conducted outreach workshops under EPCRA. Notice of the workshops is mailed to companies that may be required to report under EPCRA. Respondent was on the mailing list for these mailings at least in 1987 and 1993.

34. Information contained in the toxic chemical release inventory is used by both EPA and local communities for purposes of emergency planning and pollution prevention planning.

35. Acetone was delisted by the Final Rule published at 60 Fed. Reg. 31643, effective June 16, 1995.

Dated: October 9, 1996.

U. S. Environmental Protection Agency,  
Region 9

By: \_\_\_\_\_

Catalina Yachts, Inc.

By: \_\_\_\_\_

Robert D. Wyatt, Esquire  
Beveridge & Diamond

CERTIFICATE OF SERVICE

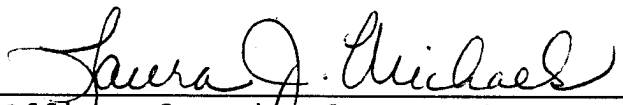
I hereby certify that the original copy of the foregoing Stipulation of Facts was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, Room 3706 (1900)  
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire  
Eileen M. Nottoli, Esquire  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, California 94105

10-10-96  
Date

  
Office of Regional Counsel  
U. S. Environmental Protection  
Agency, Region 9



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

November 14, 1996

FAX (415) 397-4238

Robert D. Wyatt, Esquire  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, CA 94104-4438

Re: Catalina Yachts, Inc.  
Docket No. EPCRA-09-94-0015

Dear Mr. Wyatt:

This letter is a response to your voice mail message that I received yesterday in the afternoon. To the three questions that you asked, I have the following responses:

1. The Certified Statement is dated June 28, 1996, why the delay in filing the document?

There are two reasons for not filing the document earlier. One, is the hope that the case would settle and filing of additional documentary evidence would in that event, be unnecessary. The second reason is more obvious--the hearing is set to begin January 28, 1997, I will be on annual leave much of the month of December, returning in early January. I would consider it unprofessional and inappropriate to wait until I'm ready to step through the courthouse door to amend the prehearing exchange. Most ALJs in my experience want these modifications as soon as possible. Some of the ALJs, and I don't know where Judge Nissen stands in this regard, will not permit amendment of the prehearing exchange to add documents after the hearing commences.

2. Relevance of the document to be filed?

This document is to show that Respondent's Florida operation has at all times complied with the Section 313(a) of EPCRA.

3. Would Complainant object to Respondent amending its

Robert D. Wyatt, Esquire  
BEVERIDGE & DIAMOND  
Re: Catalina Yachts, Inc.  
November 14, 1996

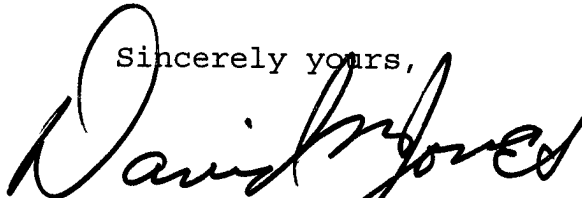
Page 2

prehearing exchange?

Complainant has no objection to Respondent amending its prehearing exchange and would urge Respondent to do so as soon as possible. In amending your prehearing exchange you should be prepared to respond to the same questions that you've raised.

I hope the responses to your interrogatories above, will permit you to respond to our November 6, message that you have no objection to the motion to amend our prehearing exchange. If you have any questions regarding this letter or the Catalina enforcement action, please feel free to contact me at your convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David M. Jones". The signature is fluid and cursive, with a large initial "D" and "J".

David M. Jones  
Assistant Regional Counsel





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

January 8, 1997

Hon. Spencer T. Nissen  
Office of Administrative Law Judges  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

RE: CATALINA YACHTS  
DOCKET # EPCRA-09-94-0015

Dear Judge Nissen:

I am writing to inform you of the room assignment for the hearing you have scheduled in the above-named action. This courtroom is provided by the U. S. District Court.

The assignment is:

ROOM: Courtroom #14, 14<sup>th</sup> Floor  
DATES: January 28 & 29  
LOCATION: U.S. District Court  
450 Golden Gate Avenue  
San Francisco, CA 94102

Access to the court will be provided by building security. For facility questions during the hearing you may contact Sharon Moss, Director of Court Services, of the U.S. District. The phone number for Ms. Moss is (415) 522-2057.

A court reporter from the Hill Reporting Service has been scheduled to prepare the transcript. Contact: Kay Hill. Phone: (415) 661-3344.

If I may be of further assistance, please contact me at (415)-744-1389.

Sincerely,

*Danielle L. Carr*  
for Steven Armsey  
Regional Hearing Clerk

cc: D. Jones  
R. Wyatt

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
Catalina Yachts, Inc., ) Docket No. EPCRA-09-94-0015  
Respondent )

NOTICE OF HEARING

Notice is given that a hearing on the captioned proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045 (Supp. IV 1986), will be held in San Francisco, California, commencing at 9:30 a.m. on Tuesday, January 28, 1997.

A pre-hearing conference will immediately precede the hearing at the same time and place.

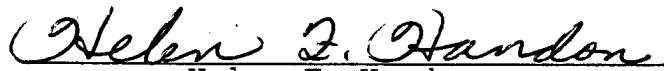
The Regional Hearing Clerk is directed to make arrangements for reporting services and for a suitable hearing room and to inform the parties and the undersigned of its location.

Dated this 4<sup>th</sup> day of September 1996.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this NOTICE OF HEARING, dated September 4, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: September 4, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

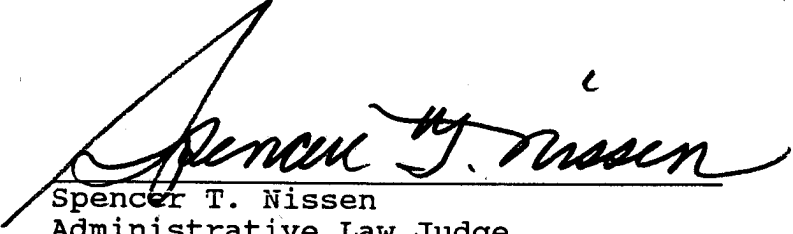
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
Catalina Yachts, Inc., ) Docket No. EPCRA-09-94-0015  
Respondent )

NOTICE OF CANCELLATION OF HEARING

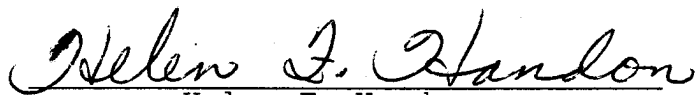
Counsel for Complainant having by motion, dated June 5, 1996, requested leave to continue the hearing on the captioned matter due to unavailability of Complainant's main witness, the hearing scheduled for July 23, 1996, is canceled. The hearing will be rescheduled at a later date.

Dated this 18<sup>th</sup> day of June 1996.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this NOTICE OF CANCELLATION OF HEARING, dated June 18, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: June 18, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, Ca. 94105

May 6, 1996

Honorable Spencer T. Nissen  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

RE: CATALINA YACHTS, INC.  
DOCKET # EPCRA-09-94-0015

Dear Judge Nissen:

I am writing to inform you of the room assignment for the hearing recently re-scheduled in the above named case.

The assignment is:

ROOM: Courtroom #1  
DATE: July 23-24, 1996  
LOCATION: U.S. BANKRUPTCY COURT  
235 Pine Street (24th Floor)  
San Francisco, CA 94104

This courtroom is provided by the Bankruptcy Court. The courtroom is located on the 24th floor, but in order to gain access to the room, please proceed first to the security office on the 19th floor. For questions regarding the facility, you may contact the court clerk, Valerie Knorr, at (415)-705-3126.

A court reporter will be scheduled to produce the hearing transcript. I will provide you the name and address of the reporting service shortly.

For any further assistance, please call me at (415)-744-1389

Sincerely,

*Steven Armsey*  
Steven Armsey  
Regional Hearing Clerk

cc:D.Jones  
E.Nottoli

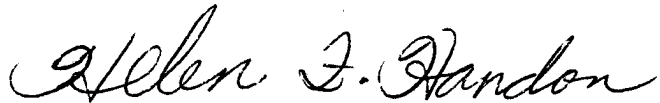
**BEFORE THE ADMINISTRATOR**

## NOTICE OF RESCHEDULED HEARING

\* It is anticipated that the hearing will require two days.

CERTIFICATE OF SERVICE

This is to certify that the original of this NOTICE OF HEARING, dated April 25, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: April 25, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105



BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
Catalina Yachts, Inc., ) Docket No. EPCRA-09-94-0015  
 )  
Respondent )

Under date of February 29, 1996, Complainant filed a motion for discovery requesting that Catalina be directed to provide copies of its income tax returns for the most recent five-year period. The information was assertedly sought for the purpose of assisting Complainant to meet its burden of proof as to the appropriateness of the penalty in accordance with In re: New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, October 20, 1994). Under Rule 22.16(b) of the Consolidated Rules of Practice (40 CFR Part 22), a party's response to a motion is to be filed within ten days of service of the motion. Rule 22.07(c) provides, however, that where service is by mail, five days shall be added to the time allowed for serving a responsive pleading. Catalina's response to the motion was therefore due to be filed [with the Regional Hearing Clerk] on or before March 15, 1996.

On March 15, 1996, I issued an order directing Catalina to provide Complainant copies of its income tax returns for the most recent five-year period on or before April 12, 1996. On March 19, 1996, my office received a copy of Catalina's memorandum, dated March 15, 1996, in opposition to the motion. Information

from the Regional Hearing Clerk's office reveals that the memorandum was filed on the day it was dated. Therefore, the opposition was timely and the order granting Complainant's motion should not have been issued without considering Catalina's objections. For the reasons set forth below, the order directing Catalina to produce its income tax returns will be rescinded.

#### DISCUSSION

By way of background, Catalina asserts that Complainant has previously been supplied a sworn declaration from its accountant detailing Catalina's financial status for the relevant years. Moreover, Catalina points out that Complainant has obtained a Dun & Bradstreet report which reflects Catalina's financial condition.<sup>1/</sup> Accordingly, Catalina argues that the motion should be denied as burdensome and duplicative. In accordance with Rule 22.24 (40 CFR Part 22), the burden of proving that a proposed penalty is "appropriate" is on Complainant. This includes a prima facie showing of respondent's financial status from which it can be

---

<sup>1/</sup> A Dun & Bradstreet report, dated January 31, 1995, is proposed exhibit 5 in Complainant's prehearing exchange. The report indicates, inter alia, that Catalina has estimated sales of over \$38 million and 410 employees.

inferred that "ability to pay" should not affect the proposed penalty.<sup>2/</sup>

Next, Catalina argues that In re New Waterbury, supra, cited by Complainant, is inapposite, because it does not address alleged violations of EPCRA, because EPCRA § 325(c), the penalty provision applicable here, does not require consideration of "ability to pay", and lastly, because Catalina has not asserted "ability to pay" as a defense to the proposed penalty. Rather, Catalina says that it has submitted evidence of its financial condition as one of several allegedly compelling factors arguing for no penalty or a de minimus penalty. The fact that New Waterbury involved the Toxic Substances Control Act rather than EPCRA is not controlling, because the principles of that case are for application whenever the relevant statute requires consideration of ability to pay in determining a penalty. In this regard, while Catalina is correct that EPCRA § 325(c) does not expressly incorporate the factors to be considered in determining

---

<sup>2/</sup> New Waterbury, supra (slip opinion at 15). Although EPCRA § 325(c) (42 U.S.C. § 11045(c)), the applicable penalty provision for the violation of EPCRA § 313 at issue here, does not expressly incorporate the factors specified in EPCRA § 325(b)(1)(C), which are to be considered in determining Class I penalties, or EPCRA § 325(b)(2), which incorporates the penalty provision from section 16 of the Toxic Substances Control Act for determining Class II penalties, the Agency has quite reasonably taken the position that these factors were intended to be applied for violations of § 313. See the Enforcement Response Policy (ERP) for Section 313 of EPCRA (December 2, 1988) and the ERP for EPCRA § 313 and Section 6607 of the Pollution Prevention Act (August 10, 1992). "Ability to pay" and "affect [of the penalty]" on Catalina's "ability to continue to do business", which are sometimes treated as one factor, must, therefore, be considered in assessing any penalty herein.

a penalty provided by EPCRA §§ 325(b)(1)(C) or (b)(2), the Agency's conclusion that Congress intended the same factors to be applied in assessing penalties for violations of EPCRA § 313 is considered to be reasonable.<sup>3/</sup>

More telling is Catalina's assertion that it is not raising ability to pay as a defense to the proposed penalty. Although this may not eliminate Complainant's duty to consider such factor, if the statute, as we have seen, is interpreted as requiring such consideration, it reduces to the vanishing point the likelihood that Catalina can contest the proposed penalty upon the ground that insufficient consideration was given to its financial condition. There is no doubt that as an objection to a proposed penalty "ability to pay" may be waived. See, e.g., New Waterbury, supra (slip opinion at 12-16). Inasmuch as the only reasonable interpretation of Catalina's assertion is that it is a waiver of "ability to pay/inability to pay" as a defense to the penalty sought by Complainant, the order directing Catalina to provide Complainant with copies of its income tax returns for the most recent five-year period will be rescinded.

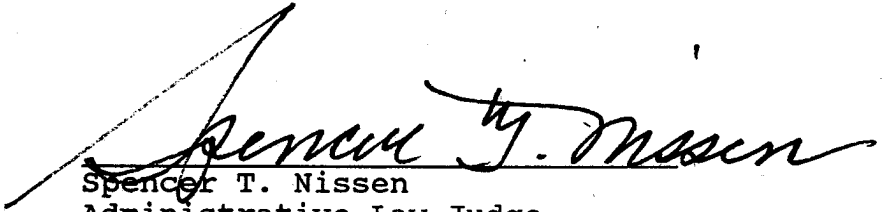
---

<sup>3/</sup> Supra note 2. Acceptance of Catalina's argument that ability to pay is not for consideration in determining the penalty would also seemingly mean that it is inappropriate to consider "other factors as justice may require." Upon reflection, Catalina may wish to reconsider this position. See *In re Spang & Company*, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, October 20, 1995).

ORDER

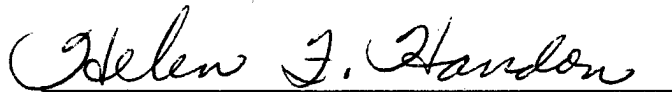
The order directing Catalina to provide Complainant with copies of its income tax returns for the most recent five-year period is rescinded.

Dated this 1st day of April 1996

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER RESCINDING DISCOVERY ORDER, dated April 1, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: April 1, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

COPY ALSO FAXED

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

COPY ALSO FAXED

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Catalina Yachts, Inc.,

Respondent

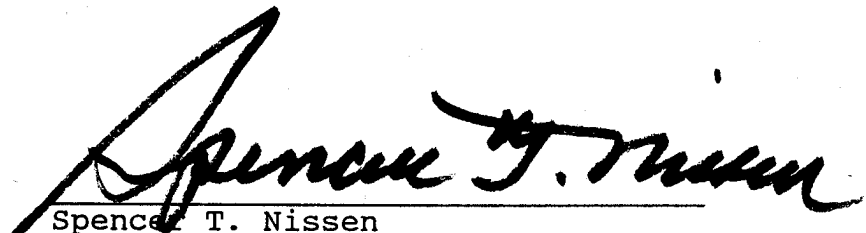
)  
)  
)  
)  
)

Docket No. EPCRA-09-94-0015

O R D E R

Counsel for Complainant having by motion, dated February 29, 1996, requested certain financial documents from Respondent which will assist Complainant in meeting its burden of proof with respect to the appropriateness of the civil penalty, and good cause having been shown, Respondent shall provide Complainant with copies of its federal income tax returns for the most recent five-year period on or before April 12, 1996.

Dated this 15<sup>th</sup> day of March 1996.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER, dated March 15, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: March 15, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

March 12, 1996

Honorable Spencer T. Nissen  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

RE: CATALINA YACHTS, INC.  
DOCKET # EPCRA-09-94-0015

Dear Judge Nissen:

I am writing to inform you of the room assignment for the hearing you have scheduled in the above named case.

The assignment is:

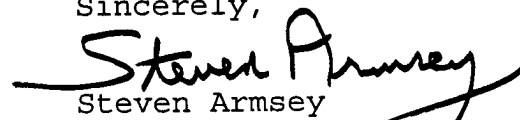
ROOM: Courtroom #1  
DATE: May 14, 1996  
LOCATION: U.S. BANKRUPTCY COURT  
235 Pine Street (24th Floor)  
San Francisco, CA 94104

This courtroom is provided by the Bankruptcy Court. The courtroom is located on the 24th floor, but in order to gain access to the room, please proceed first to the security office on the 19th floor. For questions regarding the facility, you may contact the court clerk, Valerie Knorr, at (415)-705-3126.

A court reporter will be scheduled to produce the hearing transcript. I will provide you the name and address of the reporting service shortly.

For any further assistance, please call me at (415)-744-1389

Sincerely,

  
Steven Armsey  
Regional Hearing Clerk

cc:D.Jones  
E. Nottoli

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	Docket Nos. EPCRA-09-94-0015
	)	
Respondent	)	

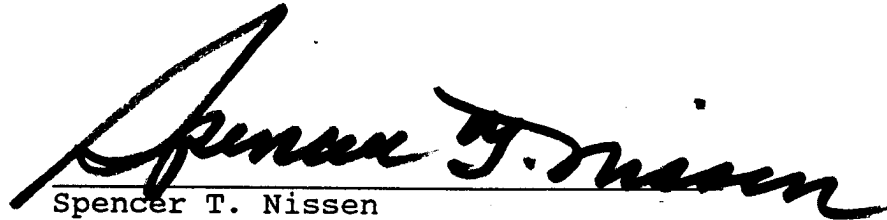
NOTICE OF HEARING

Notice is given that a hearing on the captioned proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045 (Supp. IV 1986), will be held in San Francisco, California, commencing at 9:30 a.m. on Tuesday, May 14, 1996.

A pre-hearing conference will immediately precede the hearing at the same time and place.

The Regional Hearing Clerk is directed to make arrangements for reporting services and for a suitable hearing room and to inform the parties and the undersigned of its location.

Dated this 28<sup>th</sup> day of February 1996.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this NOTICE OF HEARING, dated February 28, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: February 28, 1996

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	Docket No. EPCRA-09-94-0015
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED  
DECISION AS TO LIABILITY AND  
DENYING MOTION TO STRIKE

The complaint in this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11045) (EPCRA), issued on June 17, 1994, charged Respondent, Catalina Yachts, Inc., with failing to file Toxic Chemical Release Inventory Reporting Forms (Form Rs) for acetone for the years 1988 and 1989 and for styrene for the years 1988-1992. For these alleged violations, it was proposed to assess Catalina the maximum penalty permitted by the Act, \$25,000 per violation, for a total of \$175,000.

Catalina answered, admitting that it was the owner or operator of a facility as defined in EPCRA § 329, which is in SIC Code 3732, and that it employed more than ten "full-time employees." Catalina asserted, however, that it was reviewing its records and unable, at the present time, to respond to the failures to file Toxic Chemical Inventory Reporting Forms as alleged in the complaint. Catalina denied the alleged violations, requested a hearing to contest the

violations alleged in the complaint and the penalties proposed therefor.

On October 4, 1994, Complainant filed a motion for an accelerated decision as to liability, alleging that there was no genuine issue as to material fact and that Complainant was entitled to judgment as a matter of law. Complainant argued that Catalina's answer does not clearly and directly deny any [material] factual allegation of the complaint as required by Rule 22.15(b) of the Consolidated Rules of Practice (40 CFR Part 22) and, therefore, constituted an admission thereof in accordance with Rule 22.15(d).

Catalina responded to the motion under date of October 19, 1994. Catalina admitted that it did not file "Form R" reports for its use of acetone in the years 1988 and 1989 and for its use of styrene in the years 1988-1992. Catalina alleged, however, certain mitigating circumstances, including that it had filed numerous reports with government agencies on its use of resins containing styrene and acetone as well as on its emissions. Additionally, Catalina alleged that it had discontinued the use of acetone, that its sales had declined from approximately \$53 million to \$29 million between 1988 and 1992, that it had suffered substantial operating losses each year from 1989 to 1993, that it was unaware of its EPCRA reporting obligations until the EPA inspection, that it had cooperated fully with the inspector and promptly filed Form R reports after actual notice of the applicability of the reporting program.

Finally, Catalina alleged that during settlement negotiations, it was informed by EPA representatives that they were required to strictly adhere to the Enforcement Response Policy (ERP) for Section 313 of EPCRA (1992) and that beyond a 30 percent (downward) adjustment, EPA staff had no discretion to further adjust the penalty. Catalina points out that to treat the ERP as binding makes it a "legislative rule," which, not having been promulgated in accordance with the Administrative Procedure Act, is invalid. Catalina requested that the ALJ either dismiss this action, determine liability without awarding any civil penalty, or schedule a hearing as soon as possible to determine an appropriate penalty based on all the evidence.

On November 10, 1994, Complainant filed a motion to strike that portion of Catalina's opposition to its motion for accelerated decision which referred to communications between the parties at a settlement conference, contending (1) that statements made during the course of settlement discussions are not admissible under Federal Evidence Rule 403;<sup>1/</sup> and (2) that the ERP is not a legislative rule, because Complainant was willing to adjust the penalty by 30 percent. Catalina has opposed the motion to strike, asserting that its opposition to Complainant's motion for an accelerated decision was not a pleading within the meaning of FRCP Rule 12(f) and, thus a motion to strike is not appropriate, and,

---

<sup>1/</sup> Consolidated Rule 22.22 provides ". . . that evidence relating to settlement which would be excluded under Rule 403 of the Federal Rules of Evidence is not admissible."

that, in any event, Federal Evidence Rule 403 does not require the exclusion of evidence "otherwise discoverable" merely because it was presented in the course of settlement negotiations. Catalina argues that, because the evidence at issue is offered to prove that Complainant treats the ERP as binding, rather than to prove invalidity of the claim or the amount thereof, the evidence is within the mentioned exception and that the motion to strike should be denied.

#### D I S C U S S I O N

Catalina having conceded that it failed to file "Form Rs" as alleged in the complaint, Complainant's motion for an accelerated decision as to liability will be granted.

The motion to strike in part Catalina's opposition to Complainant's motion for an accelerated decision will be denied.<sup>2/</sup> There can be no doubt that, if, in fact, Complainant treats the ERP as binding, the ERP would be a "legislative rule" and invalid, because it was not promulgated in accordance with the APA.<sup>3/</sup> Complainant's argument that the ERP is not a legislative rule, because Complainant was willing to consider an adjustment in the

---

<sup>2/</sup> Consolidated Rule 22.16 concerning motions does not limit the subject matter of motions in any manner and the fact that FRCP Rule 12(f) confines "motions to strike" to pleadings is not controlling.

<sup>3/</sup> See United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). See also Pacific Refining Company, EPCRA Appeal No. 94-1 (EAB, December 6, 1994) (dissenting opinion, McCallum, J).

proposed penalty of 30 percent, is wide of the mark because the adjustment is well within the contemplation of the ERP.<sup>4/</sup> Therefore, consideration of such an adjustment does not refute Catalina's contention that the ERP is a legislative rule.<sup>5/</sup> While there is nothing to preclude Complainant from taking patently illegal positions during settlement discussions, such tactics make a mockery of "good faith" negotiation.

Although statement's of Complainant's representatives during settlement discussions are not admissible, statements with respect to the binding nature of the ERP may be "otherwise discoverable" within the meaning of Federal Evidence Rule 408.<sup>6/</sup> It is unnecessary to decide at this time, however, whether such statements are otherwise discoverable, because no motion for discovery is before me. The fact that the exception exists and may be applicable is considered a sufficient reason for denying the motion to strike.

---

<sup>4/</sup> For example, the ERP under "attitude" authorizes an adjustment of up to 15 percent each for "cooperation" and "compliance" (Id. 18). Moreover, acetone has recently been proposed for delisting (59 Fed. Reg. 49888, September 30, 1994). If the proposal were finalized during the pendency of this action, Catalina would be entitled to a 25 percent downward adjustment in the proposed penalty for the acetone violations under the ERP.

<sup>5/</sup> The ERP is not, of course, binding on the ALJ (Consolidated Rule 22.27(b)).

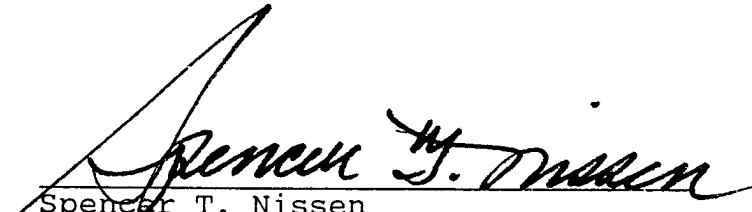
<sup>6/</sup> See, e.g., *Morse/Diesel, Inc. v. Fidelity and Deposit Company of Maryland*, 122 F.R.D. 447 (S.D.N.Y. 1988) (requirement for a particularized showing that information sought, claimed to be protected by Federal Evidence Rule 408, will lead to discovery of other admissible evidence).



O R D E R


1. Complainant's motion for an accelerated decision as to liability is granted.
2. Complainant's motion to strike is denied.
3. The amount of the penalty remains at issue and will be decided after a hearing, if a hearing is necessary.
4. Absent a settlement of this matter, the parties will, on or before March 10, 1995, furnish to the other party, the Regional Hearing Clerk, and the undersigned lists of proposed witnesses, summaries of their expected testimony and a copy of each document or exhibit proposed to be offered in evidence. After receipt of the parties' submittals in accordance with this order, I will be in telephonic contact with counsel for the purpose of establishing a location and a mutually agreeable date for the hearing.

Dated this 10<sup>th</sup> day of January 1995.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION TO STRIKE, dated January 10, 1995, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: January 10, 1995

ADDRESSEES:

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
Beveridge & Diamond  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

David M. Jones, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Reg. IX  
75 Hawthorne Street  
San Francisco, CA 94105

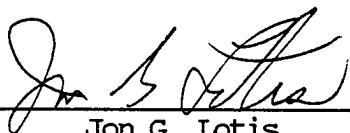
Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
Catalina Yachts, Inc., ) Docket No. EPCRA-09-94-0015  
 )  
Respondent )

ORDER OF DESIGNATION

Administrative Law Judge Spencer T. Nissen, Environmental Protection Agency, Washington, D. C., is hereby designated as the Administrative Law Judge to preside in this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. Section 11045 (Supp. IV 1986), pursuant to Section 22.21(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 CFR 22.21(a)).

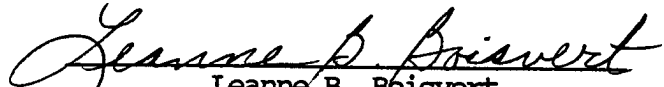
  
\_\_\_\_\_  
Jon G. Lotis  
Acting Chief Administrative Law Judge

Dated: July 22, 1994

Washington, D. C.

CERTIFICATION

I hereby certify that the original of this Order of Designation was mailed to the Regional Hearing Clerk, U. S. EPA, Region IX, and a copy was sent to Respondent and Complainant in this proceeding.

  
Leanne B. Boisvert  
Office of Administrative Law Judges

Dated: 7-22-94



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

July 15, 1994

Honorable Jon G. Lotis  
Acting Chief Administrative Law Judge  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

RE: CATALINA YACHTS  
DOCKET NUMBER EPCRA-09-94-0015

Dear Judge Frazier:

Pursuant to Section 22.21(a) of the Consolidated Rules of practice (40 C.F.R. Part 22), the above captioned matter is hereby referred to you for assignment of an Administrative Law Judge. In accordance therewith, a copy of EPA's Complaint, and a copy of Respondent's Answer, are enclosed.

Respondent is represented by:

Robert D. Wyatt, Esq.  
BEVERIDGE & DIAMOND  
One Sansome Street, Suite 3400  
San Francisco, CA 94104

Complainant is represented by:

David M. Jones, Esq.  
US EPA, Region 9  
Office of Regional Counsel  
75 Hawthorne Street  
San Francisco, CA 94105

Very truly yours,

*Danielle E. Carr*  
for Steven Armsey  
Regional Hearing Clerk

cc> D. Jones ✓  
R. Wyatt